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ILLINOIS COMMERCE COMMISSION

STATE OF ILLINOIS

COMMERCE COMMISSION

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ILLINOIS COMMERCE COMMISSION
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MENARD ELECTRIC COOPERATIVE,)
)
Complainant,)
)
vs)
)
AMERENCIPS dba CENTRAL ILLINOIS)
PUBLIC SERVICE COMPANY,)
)
Respondent.)

No. 01-0443

**MOTION TO THE ILLINOIS COMMERCE COMMISSION
TO TAKE JUDICIAL NOTICE OF THE ARGUMENT BY
AMERENCIPS db/a CENTRAL ILLINOIS PUBLIC SERVICE COMPANY (CIPS)
IN ITS APPELLATE COURT BRIEFS IN A COMPANION CASE**

MENARD ELECTRIC COOPERATIVE (Menard) (Complainant) by its attorneys GROSBOLL, BECKER, TICE & REIF, attorney Jerry Tice of counsel herewith files its Motion pursuant to 80 Ill Adm Code Section 200.190 requesting the Illinois Commerce Commission (Commission) to take judicial notice of the Appellate Briefs of CIPS filed in the Appellate Court for the Fourth District in Case No. 4-02-0443 regarding the relevance of a Section 14 claim regarding electric service to annexed premises and in support thereof states as follows:

1. Menard filed its Amended Compliant in this matter consisting of the following Counts:

- A. Count I based on Section 5 grandfathered rights to serve the Lathom Subdivision, being a part of the Lathom farm premises to which Menard was providing electric service on the farmstead on July 2, 1965.

- B. Count II consisting of a claim under Section 8 and Section 14 of the Electric Supplier Act.
- C. Count III consisting of Menard's claim that it is grandfathered to serve the Lathom premises annexed to the Village of Ashland because the Lathom Subdivision is a part of the Lathom Farm premises to which Menard was providing electric service at the Lathom farmstead on the date of annexation and therefore Menard is grandfathered to serve in the area annexed pursuant to Section 14. To the extent CIPS is found to be providing electric service to the Lathom Subdivision (area annexed) on the date of annexation then Menard requests authority from the Commission to provide electric service to the Lathom subdivision by virtue of its "grandfathered" electric service under Section 14(i) of the Act.
- D. Count IV consisting of Menard's claim to provide electric service to the Lathom Subdivision by reason of Menard's electric service to the Lathom farm premises at the Lathom farmstead on the date of annexation and therefore Menard is grandfathered to serve in the area annexed pursuant to Section 14. To the extent the Lathom Subdivision is considered an "additional premises" under Section 14 (iii) Menard requests a determination by the Commission that Menard is grandfathered under Section 14 to serve the Lathom Subdivision upon receiving authorization to use the public streets and ways of the Village of Ashland.

2. CIPS filed its Motion to Strike Counts II, III and IV of Menard's Amended Complaint. The basis of CIPS' Motion to Strike Count III was that Menard must allege that it

was serving at a "point" within the Lathom Subdivision at the time of the Subdivision's annexation to the Village of Ashland or in the alternative that Menard cannot seek Commission approval to serve the Lathom Subdivision under Section 14 without having first obtained authority to use the public streets and ways of the Village of Ashland. The basis of the CIPS Motion to Strike Count IV of Menard's Amended Complaint was the same as the basis for striking Count III. In addition CIPS moved to strike Count IV because Section 14 (iii) was not applicable as a matter of law when CIPS possesses authority to extend its lines into the annexed area under Section 14(i).

3. The basis for the CIPS Motion to Strike Counts III and Count IV of Menard's Amended Complaint fails to recognize that Section 14 grandfathers the right to an electric supplier to continue to serve the area that it was serving in on the date of annexation. In a separate case now pending Administrative Review entitled: Illinois Rural Electric Co. v Central Illinois Public Service Company Ill Com. Comm. 99-0646 (Nov. 21, 2000) (Pleasant Hill/Bybee/Capps Subd.) and Illinois Rural Electric Co. v Central Illinois Public Service Company Ill Com. Comm. 97-0287 (June 16, 1999) (Oakbrook Subd./Paxton premises), CIPS has filed appellate briefs before the Appellate Court for the Forth District, State of Illinois in Case No. 4-02-0443 in which the foregoing Commission decisions are on appellate review and in which CIPS makes the following points with regard to the applicability of Section 14 of the Act to determination of electric service rights in territory annexed to a municipality:

A. CIPS claims that the extent of such grandfathered rights depends upon the definition of "area" as used in Section 14 (p. 14 of the CIPS Initial Appellate Brief, in Case No. 4-02-0443 Oakbrook Subd./Paxton/Pleasant Hill/Capps Subd.).

B. CIPS argues to the Appellate Court that Section 14 creates grandfathered rights to ensure that a non-franchised supplier:

“may continue to furnish service within such annexed...area to premises it is serving at the time of such annexation...” (p. 16-17 of CIPS’ Initial Appellate Brief in Case No. 4-02-0443 Oakbrook Subd./Paxton/Pleasant Hill/Capps Subd.).

4. In the CIPS Reply Brief in the above mentioned Appellate Court Administrative Review proceeding, CIPS again reaffirmed its argument that Section 14 provides grandfathering of the electric service rights of a non-franchised electric service provider in the area annexed provided the non-franchised electric supplier was serving in the “area”. While CIPS argues for a limitation of the grandfathering right of Section 14 to simply a point of delivery within the annexed premises, CIPS acknowledges that “area” is not defined by the Act, (p. 7-8 CIPS Reply Brief in the Appellate Court proceeding Case No. 4-02-0443 Oakbrook Subd./Paxton/Pleasant Hill/Capps Subd.).

5. CIPS further raised at page 17 of its Reply Brief in the Appellate Court proceeding Case No. 4-02-0443 (Oakbrook Subd./Paxton/Pleasant Hill/Capps Subd.) that IREC in the foregoing Commission proceedings did not make a claim under Section 14 in its Complaint before the Commission for the right to serve the annexed premises and therefore is foreclosed with regard to any Section 14 rights it might possess.

6. Menard herewith attaches to its Motion the excerpts from the CIPS Initial Brief and Reply Brief in the Appellate Court proceeding Case No. 4-02-0443 of the Administrative Review of the foregoing Commission decisions and requests the Commission to take judicial notice of the CIPS position with respect to the relevance of Section 14 to service rights in annexed premises. CIPS is judicially estopped from asserting inconsistent position in separate

proceedings regarding the grandfathering of service rights under Section 14 of a non-franchised supplier to continue to serve the area it was serving on the date of annexation Dailey v Smith 292 Ill App 3d 22;684 NE 2d 991; 225 Ill Dec 1000, 1004 (1st Dist. 3rd Div. 1997). Counts III and IV place in issue the right of Menard as a non-franchised supplier to continue to serve the “area” it was serving on annexation whether such rights exist and are grandfathered is relevant.

7. The position of CIPS in its Motion to Dismiss that the Section 14 claims alleged in Count III and Count IV of Menard’s Amended Complaint do not apply in the instant proceeding is contrary to the position taken by CIPS in the aforescribed appellate proceeding on Administrative Review of the aforementioned Commission cases. This is particularly true when CIPS argues to the Appellate Court that Illinois Rural Electric Cooperative, the Cooperative that was a party to the aforementioned Commission decisions now on appellate review, did not make a Section 14 claim before the Commission. Menard as the electric cooperative seeking to provide the electric service to the Lathom subdivision in the instant case is by way of its Amended Complaint seeking to make a claim under Section 14 to preserve its claimed grandfathered rights as established by Section 14 to serve the annexed Lathom subdivision should Menard’s Section 5 rights not be sustained and therefore the claim by CIPS that Section 14 is not relevant to the proceeding should be disregarded as inconsistent with the argument made by CIPS on Administrative Review before the Appellate Court in the aforesaid described Commission proceedings.

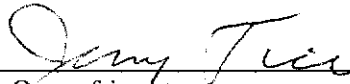
WHEREFORE, Menard Electric Cooperative requests the Illinois Commerce Commission for the following relief:

A. To take judicial notice of the excerpts from the CIPS Appellate Brief filed before the Appellate Court for the Fourth District of the State of Illinois in Case No. 4-02-0443 Oakbrook Subd./Paxton/Pleasant Hill/Capps Subd., being appeals on Administrative Review of the Illinois Commerce Commission decision in Case Nos. 97-0287 and 99-0646 and which excerpts pertain to the nature of and relevancy of Section 14 claims to electric service in the annexed premises.

B. For such other and further relief as the Commission deems just and equitable.

MENARD ELECTRIC COOPERATIVE,
Complainant,

By: GROSBOLL, BECKER, TICE & REIF

By: 
One of its attorneys

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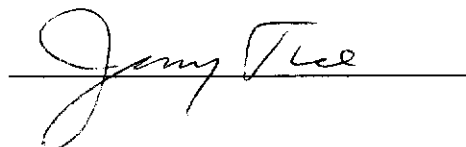
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PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the 13 day of March, 2003, I deposited in the United States mail at the post office at Petersburg, Illinois, postage fully paid, a copy of the document attached hereto and incorporated herein, addressed to the following persons at the addresses set opposite their names:

Mr. Scott Helmholz
BROWN HAY & STEPHENS
205 S. 5th
Suite 700
Springfield, IL 62701

Mr. William Showtis
Administrative Law Judge
Clerk of the Illinois Commerce Commission
527 E. Capitol
Springfield, IL 62701-1827

A handwritten signature in cursive script, reading "Jerry Tice", is written over a horizontal line.

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